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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 330

BALTIMORE TRANSIT COMPANY
and
GERALD M. HARRISON,
Petitioners,

vs.

STATE OF MARYLAND, for the use of
GLORIA S. GEILS, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

George P. Bowie
901 Washington Avenue
St. Louis, Missouri 63178
and
Patrick A. O'Doherty
824 Fidelity Building
Baltimore 1, Maryland
Counsel for Petitioners

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Fourth Circuit

Baltimore Transit Company and Gerald M. Harrison pray that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals, entered March 9, 1964 in the above entitled case.[1]

[1] Following is a complete designation of the respective respondents: State of Maryland, for the use of Gloria S. Geils, surviving widow, and Roswell W. Geils, 3rd, Leslie Ann Geils, Mary E. Geils, Susan M. Geils, Andrew S. Geils and Sarah Geils, surviving infant children of Roswell W. Geils, Jr., deceased, and Gloria S. Geils, Administratrix of the Estate of Roswell W. Geils, Jr., deceased.

OPINIONS BELOW.

No opinions were rendered by the District Court. The majority and dissenting opinions of the Circuit Court of Appeals are reported in 329 F. 2d 738, these opinions constitute Exhibit A of Appendix A to the petition (*infra*, p. 13). For the convenience of this Court, the opinion in *Grier v. Rosenberg*, 213 Md. 248, 131 A. 2d 737, upon which the judgment of the Circuit Court of Appeals must stand or fall, is included as Exhibit B to Appendix A of this petition (*infra*, p. 35).

JURISDICTION TO REVIEW.

The judgment of the Circuit Court of Appeals was entered on March 9, 1964, CCA-R., p. 45,[2] Exhibit A to Appendix B to this petition (*infra*, p. 47). Rehearing was denied June 11, 1964, CCA-R., p. 70, Exhibit B to Appendix B to this petition (*infra*, p. 48).

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, U. S. C. A. (June 25, 1948, c. 646, 62 Stat. 928). The pertinent portion of which is as follows:

> "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;".

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[2] "CCA-R." references refer to the folios in the record of proceedings before the Circuit Court of Appeals, designated by that court as Vol. 3, Proceedings; "R." references refer to the folios in the record of proceedings before the United States District Court for the District of Maryland, designated as Vol. 1, Appendix by the Circuit Court of Appeals, 9 copies of which have been filed herewith.

QUESTIONS PRESENTED.

1. Where a Circuit Court of Appeals has, by the effect of its judgment in reversing a jury verdict in favor of Petitioners, overruled *Erie R. Co. v. Tompkins*,[3] and provided a double standard of law as between litigants in a state court and litigants who find themselves, by reason of diversity alone, in a federal forum, and, where the standard applied by the federal court is in open derogation of the binding state law as announced by the highest court of the state, should not this court assume jurisdiction to review the stated grounds upon which such judgment was entered?

2. Whether a circuit court of appeals can evade the boundaries of controlling state law, in a diversity case, by alleging that the admitted controlling state decision contains language warranting reversal of the judgment of the district court, when in fact, the alleged language is a creation of the Circuit Court of Appeals and does not appear in the opinion of the state court, particularly where without such language, the judgment of the district court on verdict of the jury, is correct and is in complete conformity with controlling state law?

3. Whether, in a diversity case, failure to apply controlling state law by a Circuit Court of Appeals can be hidden under the judicial expression of the majority of that court that the controlling law of the state is the law as enunciated by the circuit court of appeals, when such enunciated law is in irreconcilable conflict with the controlling state law on the issue?

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[3] 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.

STATUTE INVOLVED.

Title 28, U. S. C. A.

Section 1652. State laws as rules of decision. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, c. 646, 62 Stat. 944, Title 28, U. S. C. A., Section 1652, at page 110).

STATEMENT.

Respondents, citizens of Pennsylvania, filed a Complaint against Petitioners, citizens of Maryland, demanding judgment in the aggregate of $525,000.00 (R. 5). Jurisdiction of the District Court was invoked because of diversity of citizenship.

Respondents' decedent, a pedestrian, was struck and killed by Petitioners' bus at or near a traffic controlled intersection in the City of Baltimore, Maryland.

The essence of the issues of fact to be resolved by the jury was:

(1) Whether the deceased or the Petitioners had the favorable traffic signal at the time of the accident, and,

(2) Whether the deceased was within the pedestrian crosswalk at the time of the accident.

The evidence offered and adduced by Respondents with respect to the conduct of the deceased was itself sufficient conflicting to permit the jury to have found the deceased guilty of contributory negligence on the basis of the statement read into evidence by Respondents' witness,

Officer Profili (R. 55). Petitioners' evidence concerning the conduct of the deceased was in sharp conflict to Respondents' evidence on this issue. Equally conflicting evidence was offered by both parties with respect to the question of who had the favorable traffic light at the time of the accident.

The wide degree of conflict and the abundance of evidence introduced by both parties with respect to the issues stated above were such that the District Court was compelled, under controlling Maryland law, to include the following instruction as to the operative effect of the presumption of due care in its charge to the jury:

> "If you find that Mr. Geils failed to meet any one or more of the various obligations which I have told you the law imposed on him, you may find when you consider all of the circumstances that he failed to use ordinary care. In considering whether Mr. Geils exercised ordinary care I instruct you that ordinarily, a decedent is presumed to have exercised ordinary care for his own safety in accordance with (1126) the natural instinct of human beings to guard against danger, but where, as here, evidence has been offered to show that the decedent failed to exercise ordinary care in a number of respects, you shall consider the proof which has been offered and determine whether you are persuaded by a preponderance of the evidence that he failed to exercise ordinary care, and you are not to rely upon the presumption" (R. 515).

It is significant to note that the Court's charge to the jury (R. 505) is in excess of twenty printed pages and the only error complained of involves that portion of the charge above quoted. The jury returned a verdict in favor of the Petitioners (R. 536). Post verdict motions were filed by Respondents (R. 25), and denied after hearing (R. 28).

Upon appeal of respondents, the cause was argued before the Circuit Court of Appeals (Judges Bell, Haynsworth and Chief Judge Sobeloff); the judgment of the majority of that court was entered March 9, 1964, Judge Haynsworth dissenting (Appendix B, Exhibit A, *infra*, p. 47; CCA-R., p. 45) reversing judgment on verdict in favor of Petitioners and remanding the case for new trial. Petition for Rehearing en banc was denied June 11, 1964 (Appendix B, Exhibit B, *infra*, p. 48; CCA-R., p. 70). Petition to stay the judgment of the Circuit Court of Appeals and petition for an extension of stay were granted (App. C, p. 50 and p. 51,[4] CCA-R., pp. 75 and 81).

The majority bottomed its judgment upon what they erroneously refer to as the principal Maryland case of *Grier v. Rosenberg*, 213 Md. 248, 131 A. 2d 737 (App. A, p. 35), for two stated reasons, each essential to support the reversal of the verdict of the jury and judgment thereon:

1. Because the Maryland court reviewed and cited cases involving the presumption of due care in negligence cases in support of its opinion in *Grier*.

2. Because Judge Prescott, speaking for the Maryland court in *Grier*, explicitly pointed out that the precedents in that state recognize no basis for any distinction between the presumption of due care and the presumption of agency arising from the fact of ownership (App. A, pp. 17-18).

Neither of the stated reasons appear explicitly or otherwise in *Grier*. Judge Prescott made no such statement and the cases cited in *Grier* involve either the presumption agency or the inference of negligence arising under the doctrine of *res ipsa loquitur*. No case cited in Grier involves the presumption of due care.

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[4] "App." references are to the Appendix to this petition.

The judgment of the Circuit Court of Appeals is contrary to the decision of the District Court which followed controlling state law in that, *inter alia*, it repudiates the binding effect of state law upon federal courts in a diversity case by adding to the state decision language of its own, decisive of the very issue presented.

REASONS FOR GRANTING THE WRIT.

The majority opinion reincarnates the doctrine of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, which was laid to rest by this Court 26 years ago. Every litigant entitled to rely upon the law of Maryland, who by accident of diversity must defend his rights in a federal forum, is now beset with a double standard of law. The majority holds that when a person is unavailable by reason of death or injury sustained, those suing on his behalf are entitled to have the jury instructed on the presumption of due care and to have the jury consider the presumption of due care in conjunction with evidence introduced by both parties showing the acts and conduct of such incapacitated person, when the evidence is in conflict with respect to whether or not such person was exercising due care for his safety (App. A, p. 21): This holding is directly contrary to the law of Maryland as announced by the highest court—that the presumption in the light of evidence takes flight.

Such a course of judicial proceedings was condemned by this Court in the *Erie R. Co.* case as depriving litigants of due process and equal protection of law.

It is beyond dispute that the Circuit Court of Appeals violated the mandate of this Court in *Erie R. Co.* case and subsequent cases applying the Rules of Decision Act, *supra*, p. 4. That clear mandate is that federal courts must follow the law of the highest court of the state in diversity cases. That decision prohibits federal courts from applying their own view of what the law ought to

be and certainly, it prohibits federal courts from amending and supplementing state decisions with convenient language which is decisive of the very question before the federal forum.

The rule in the *Erie R. Co.* case was elaborated upon in *West v. American Telephone & Telegraph Co.*, 311 U. S. 223 at 236, 85 L. Ed. 139, 61 S. Ct. 179 (1940), to caution federal courts that state decisions are not to be lightly put aside because a federal forum may be of the opinion that the state law may change. This Court stated:

> "True, as was intimated in the *Erie R. Co.* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted."

The dissenting jurist in the case at bar cited and reviewed every Maryland case since 1869 involving the application of the presumption of due care and pointed out that the majority failed to follow the controlling Maryland law (App. p. 22). He also pointed out that the majority erred in its reliance upon a single Maryland case, *Grier v. Rosenberg, supra*, p. 2, which dealt with a different presumption in a very dissimiiar context—the presumption of agency arising out of proof of ownership of an automobile (App. pp. 22, 27).

The majority stated that *Grier* was applicable because it contained citation of cases involving the presumption of due care in support of its opinion and the majority stated:

> "Judge Prescott, speaking for the Maryland court, explicitly pointed out that the precedents in that State recognize no basis for any distinction between the presumption that the decedent exercised due care

for his self-preservation and the presumption of agency arising from the fact of ownership."

No case cited in *Grier* involves the presumption of due care and Judge Prescott made no such statement attributable to him by the majority, explicitly or otherwise. What the majority did was to apply *Grier* as the controlling case under the Rules of Decision Act, *supra*, p. 4, not as written by the state court, but rather, as amended and rewritten by the Circuit Court of Appeals. Petitioners agree that had *Grier* contained the language composed by the Circuit Court of Appeals, *Grier* would be decisive of the question before the federal court and the judgment of the Circuit Court would have been correct.

Under a long line of Maryland cases, the distinction between the presumption of agency in *Grier* and the presumption of due care is that a presumption of agency must be rebutted by evidence which is conclusive, uncontradicted and uncontroverted.[5] Whereas, a presumption of due care will not survive evidence to the contrary or testimony that tends strongly to show the existence of fault.

The dissenting judge reviewed every Maryland case involving the presumption of due care. The latest expression of the highest court of Maryland, with respect to the presumption of due care, is contained in *Chenoweth v. Baltimore Contracting Co.*, 177 Md. 1, 6 A. 2d 625 (1939):

> "In *Maryland Central R. Co. v. Neubeur*, 62 Md. 391, 402, the court narrowed that general language (that of *Northern Cent. R. Co. v. State, for Use of Geis*), by this statement: 'While it is natural, and as a general rule rational, to presume that a party acts

[5] *Grier v. Rosenberg*, 213 Md. 248, 131 A. 2d 737; *Fowser Fast Freight v. Simmont*, 196 Md. 584, 78 A. 2d 178; *Taylor v. Freeman*, 186 Md. 474, 47 A. 2d 500; *Pennsylvania R. R. v. Lord*, 159 Md. 518, 151 A. 400.

> from incentives of self-preservation, this presumption can only be indulged in the absence of proof to the contrary. To instruct the jury that they may, in considering the whole case "infer the absence of fault on the part of the plaintiff, from the known disposition of persons to avoid injuries to themselves," in the presence of testimony that tends strongly to show the existence of fault is tantamount to instructing them that they may conclude as they please; that they may find upon presumption and put the evidence aside' ".

The significance of the decision in *Grier* has escaped the majority in that the Court of Appeals of Maryland explicitly emphasized that Grier involved a presumption of *agency*, not one of *negligence*.[6] Both the Maryland court and the dissenting jurist recognized that different rules apply to different presumptions.

In *King v. Order of United Commercial Travelers of America*, 333 U. S. 153, 157-158, 92 L. Ed. 608, 611, 68 S. Ct. 488 (1948), this Court stated:

> "The ideal aimed at by the Act is, of course, uniformity of decision within each state . . . and it is inadmissible that cases dependent on that law should be decided differently according to whether they are before federal or state courts. This is particularly true where accidental factors such as diversity of citizenship and the amount in controversy enable one of the parties to choose whether the case is tried in a federal or a state court."

The majority has rejected the expression of the highest court in Maryland with respect to the operative effect of the presumption of due care and has created its own rule to be enforced by the District Court in diversity

[6] Emphasis Maryland Court of Appeals.

cases. That rule is that whenever evidence contrary to the presumption or testimony that tends strongly to show the existence of fault is in conflict, then the jury must be instructed on the presumption and be allowed to consider the presumption in conjunction with such evidence. This rule completely destroys the sanctity of the law of the sovereign states and were it permitted to stand or spread to other diversity cases, it would superimpose federal law and rules in derogation of the rights of litigants to due process and equal protection of the law. This Court eliminated the unconstitutional double standard doctrine of *Swift v. Tyson, supra,* p. 7, by its decision in the *Erie R. Co.* case and has scrupulously adhered to that doctrine for over a quarter of a century. The legal chaos which would result from the ability of a Circuit Court of Appeals to disregard the Rules of Decision Act and controlling decisions of this Court is patent and such an attempt warrants this Court in unhesitatingly taking jurisdiction to review the judgment in this case.

Petitioners rely upon the following decisions:

Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095;
U. S. v. General Motors Corp., 323 U. S. 373, 374, 89 L. Ed. 311, 65 S. Ct. 357, and
American Construction Company v. Jacksonville T. & K. R. Co., 148 U. S. 372, 37 L. Ed. 486

as authority for this Court to issue its writ of certiorari to review a non-final judgment of a Circuit Court of Appeals. The variance of reasons for granting certiorari to review the non-final judgments in each of the above cited cases are, in the aggregate, contained in this case—there is a conflict of law between decisions of the highest court of Maryland and the Court of Appeals for the Fourth Circuit, the judgment of the Circuit Court of Appeals presents a novel and important question of law and the petitioners' position, if sustained, would render the decision of the majority wholly void.

Judge Haynsworth noted the significance of the decision in this case by his comment that the result of the majority judgment ". . . will be a radical distortion and perversion of the burden of persuasion . . ." (App. A. 33).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

GEORGE P. BOWIE,
PATRICK A. O'DOHERTY,
Counsel for Petitioners.

APPENDIX A.

EXHIBIT A.

Majority and dissenting opinions of the United States Court of Appeals, Fourth Circuit.

State of Maryland for the Use of Gloria S. Geils, surviving widow, and Roswell W. Geils, 3rd, Leslie Ann Geils, Mary E. Geils, Susan M. Geils, Andrew S. Geils and Sarah Geils, surviving infant children of Roswell W. Geils, Jr., deceased, and Gloria S. Geils, administratrix of the Estate of Roswell W. Geils, Jr., deceased, Appellants,

v.

Baltimore Transit Company, a body corporate, and Gerald M. Harrison, Appellees.

No. 8941.

United States Court of Appeals,
Fourth Circuit.

Argued Sept. 26, 1963.

Decided March 9, 1964.

Action for wrongful death. The United States District Court for the District of Maryland, at Baltimore, Harrison L. Winter, J., entered judgments for defendant bus company and bus driver, and the plaintiffs appealed. The Court of Appeals, Bell, Circuit Judge, held that under applicable Maryland law presumption of due care on part of deceased survived the introduction of conflicting evidence, and failure of court to give instruction according plaintiffs the benefit of presumption where evidence was in sharp conflict was error.

Reversed and remanded.

Haynsworth, Circuit Judge, dissented.

1. Death, Key 58 (1).

Federal Civil Procedure, Key 2174.

Under applicable Maryland law presumption of due care on part of deceased survived the introduction of conflicting evidence, and failure of court to give instruction according plaintiff benefit of presumption in wrongful death action in which evidence was in sharp conflict was error.

2. Death, Key 58 (1).

Negligence, Key 122 (1).

Presumption of due care may be invoked only where injured person is unavailable because of injuries suffered or because of death.

3. Witnesses, Key 319.

Introduction of evidence to discredit statements of plaintiff's chief witness that he had had an opportunity to observe fatal accident was within court's discretion, if issue could be said to be collateral.

4. Federal Civil Procedure, Key 2174.

Failure to instruct jury in wrongful death action with reference to doctrine of last clear chance was proper where evidence furnished no basis for such an instruction.

Paul Berman, Baltimore, Md., for appellants.

Patrick A. O'Doherty and Frank X. Gallagher, Baltimore, Md., for appellees.

Before Sobeloff, Chief Judge, and Haynsworth and J. Spencer Bell, Circuit Judges.

J. Spencer Bell, Circuit Judge.

The plaintiffs' intestate was killed at a street corner in the city of Baltimore when struck by a bus owned by the

defendant Transit Company and driven by the individual defendant. Judgment was entered for the defendants upon a general verdict. Plaintiffs allege that the court erred in charging the jury as follows:

> "I instruct you that ordinarily, a decedent is presumed to have exercised ordinary care for his own safety in accordance with the natural instinct of human beings to guard against danger, but where as here, evidence has been offered to show that the decedent failed to exercise ordinary care in a number of respects, you shall consider the proof which has been offered and determine whether you are persuaded by a preponderance of the evidence that he failed to exercise ordinary care, and you are not to rely upon the presumption."

Both parties to this appeal concede, and we agree, that the federal courts are bound in diversity cases by the applicable state rules with respect to the effect to be given to presumptions, "since the effect accorded these presumptions may substantially affect the rights of the parties and there is nothing in the Federal Rules to the contrary." 5 Moore's Federal Practice, § 43.08. The plaintiffs had submitted a written request for an instruction to the jury that they might consider the presumption of due care in connection with the other evidence. The court rejected the request and instructed the jury as above set out. In this we find fatal error.

The principal Maryland case on this point is Grier v. Rosenberg, 213 Md. 248, 131 A. 2d 737 (1957). In that case the plaintiff, a passenger, was injured by the sudden stopping of the bus. She sued the bus company, the bus driver, and one Rosenberg, who was the owner of an automobile which, the bus driver testified, cut sharply across his path and caused him to come to a sudden stop. The jury rendered a verdict for all three defendants. The

plaintiff appealed from a judgment for the car owner, Rosenberg. The Court of Appeals of Maryland reversed the judgment and remanded the case for a new trial. In doing so the court pointed out that the plaintiff had offered evidence from which the jury could find ownership of the car in the defendant Rosenberg. She had asked for an instruction that from this evidence, if believed, a presumption arose that the car was being driven by the owner or by the owner's agent about the owner's business. The trial court refused to give the instruction because the defendant had offered evidence which conflicted with the presumption. The appellate court held failure to give the instruction was fatal. In a careful review of the Maryland decisions and authorities in the field of Evidence, Judge Prescott said that the presumption prevails and the jury should have been so instructed despite the fact that countervailing evidence was adduced upon the disputed presumption. The court said:

> "In cases of this nature, after the plaintiff has offered proof of the ownership of the automobile in the defendant, if the defendant does not offer any evidence on the issue of agency, the Court should instruct the jury that if they find as a fact that the defendant owned the car, they must find that he is responsible for the negligence (if any) of the driver. If the defendant does present evidence to show that the alleged driver was engaged on business or a purpose of his own, it may be so slight that the Court will rule it is insufficient to be considered by the jury in rebuttal of the presumption, in which case the Court should grant the same instruction it would have granted if the defendant had offered no evidence on the issue. The evidence may be so conclusive that it shifts the burden or duty of going forward with the evidence back to the plaintiff, in which event the defendant would be entitled to a directed verdict, if

the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant's evidence. Erdman v. Horkheimer & Co., supra, 169 Md. [204] 207, 181 A. 221; Fowser Fast Freight v. Simont, supra, 196 Md. [584] 588, 78 A. 2d 178. The evidence, however, may fall between the two categories mentioned above, in which event the issue of agency should be submitted to the jury. Cf. 3 Md. Law Rev. 287, 288. It would be difficult, if not impossible, to lay down a rule, that would apply in all cases, as to when the evidence is so slight that it is insufficient to be considered by the jury in rebuttal of the presumption of agency, or so conclusive as to require a directed verdict for the defendant. These matters must depend upon, and be decided by, the facts developed in each individual case."

The defendant in this appeal argues that Grier v. Rosenberg is not applicable because the evidence there offered in rebuttal of the presumption was so slight that the trial court would have been justified in holding that it was insufficient to be submitted to the jury in the face of the presumption, but such was not the holding of the court. Indeed, the appellant in the Grier case made the point in an effort to secure a reversal instead of a remand for a new trial, but the argument was rejected. The court expressly held that the conflicting evidence was enough to take the case to the jury.

The defendant here also argues that the presumption in Grier v. Rosenberg is different from the presumption of due care here considered and thus that case may not be taken as a precedent. With this argument we must also disagree, because first, we can find no case in Maryland which makes any such distinction and second, in reaching its decision the court reviewed and cited cases involving the presumption of due care in negligence cases in support of its opinion.

Our dissenting Brother similarly misinterprets Grier v. Rosenberg and would unduly restrict its rule. We perceive no basis in law or in logic for the suggested distinction; but, more importantly, Judge Prescott, speaking for the Maryland Court, explicitly pointed out that the precedents in that State recognize no basis for any distinction between the presumption that the decedent exercised due care for his self-preservation and the presumption of agency arising from the fact of ownership. And this observation of Judge Prescott is immediately followed by the very sensible question, "[I]ndeed, if the instruction be not granted, how is the jury to know of the presumption?"

On the other hand, the dissenter's analysis of Western Maryland R. R. v. State, to Use of Shirk, 95 Md. 637, 53 A. 969 (1902), overlooks a significant distinction. There the Maryland Court refused to apply the presumption because "[T]here [was] no room for a rational doubt, upon the evidence as to the acts and conduct of deceased." Here, on the contrary, as all of us recognize, "the evidence was sharply conflicting," supplying the very basis for applying the presumption which the court found lacking in Shirk.

[1] The defendant cites us to State, for Use of Chenoweth v. Baltimore Contracting Co., 177 Md. 1, 6 A. 2d 625 (1939), as authority to the contrary. Since there are passages in our record which seem to indicate that the trial court may have relied on that opinion, we have examined it at length. There the deceased was a car inspector, inspecting railroad cars and making minor repairs in a "Gravity yard" operated by the defendant company in transferring coal from railroad cars to ships. The cars, after being emptied, were released from a tipple to coast down an incline, where they accumulated until sufficient in number to make up a train of empties. While cars

were being thus accumulated, the deceased was inspecting and making minor repairs. Yard rules required that deceased display a blue flag in front of the car when working on it. No flag was displayed. Deceased's body was found under a car after it was "bumped" forward and off the track by a string of empties. The plaintiff appealed from a directed verdict, contending that the presumption of due care should have been considered along with the conflicting evidence and should have carried the case to the jury. But the appellate court sustained the directed verdict, saying that the presumption would not survive *proof* to the contrary. (Emphasis added.) The court pointed out that the undisputed evidence as to the position of the deceased's body was such that it left no basis for a presumption of due care. The only logical inference to be drawn from the position of the deceased's body was that he was standing between the cars or lying underneath them when the cars were "bumped" forward. The inference was so compelling, the court held, that the jury could not reasonably infer from the naked presumption of due care that the deceased was otherwise engaged, i. e., as the plaintiff theorized, that he was standing beside the track and was struck when the car was knocked off the rail. We think the opinion places this case in Judge Prescott's third category—one in which the evidence is such that the burden of proof has been carried to the extent that even after taking the presumption into account, plaintiff was shown to be guilty of negligence as a matter of law and, for this reason, the court sustained the directed verdict.

We are also aware that in many states the rule as to presumptions is to the contrary—that is, that the presumption survives only until conflicting evidence is offered. This is the rule suggested in the American Law Institute's Model Code of Evidence, Rule 704. It is the rule at-

tributed to Thayer and suggested by Wigmore. But we are bound by the law of Maryland, and we might add that the Maryland rule is strongly supported by such eminent authorities as McCormick, Evidence, §§ 316, 317 (1954), and by the writings of Professor Morgan, who, contrary to his expressed opinions, finally acceded to the wishes of the committee in drafting the Model Code.

We are also supported in our view of the Maryland law by the opinion of Judge R. Dorsey Watkins in Jennings v. United States, 178 F. Supp. 516 (D. Md. 1959). In that case the plaintiff's decedent was killed in an automobile accident resulting from his car's skidding on ice on a U. S. Government maintained parkway road in Maryland. The Government contended that the defendant was contributorily negligent in speeding and failing to observe the condition of the highway and to keep his car under control. After an exhaustive discussion of the applicable Maryland law, the judge carefully reviewed the conflicting evidence and concluded:

> "On all the evidence and in view of the presumption of due care on the part of the deceased, the court is unable to find that the Government has met its burden of proving Stewart's contributory negligence by a fair preponderance of the evidence.
>
> "The court therefore finds as a fact that Stewart was not guilty of contributory negligence."

In a footnote the conscientious trial judge said: "The question is a very close one, and the court's mind is more nearly in a 'state of equipoise or even doubt' than in any other case in which it has participated." Here the court, performing the function of the jury in our case, was carefully weighing the presumption against both corroborating and conflicting evidence in compliance with its view of the Maryland law on the subject.

[2] We are unable to acquiesce in the final suggestion in our colleague's dissenting opinion, that the presumption in Maryland that the decedent acted with due care stands on a parity with the presumption that the defendant was free from negligence and that therefore the district court should tell the jury at the retrial that the presumption as to the disposition to act in self-preservation applies equally to the defendant's driver. The comment is then added that the result would be a radical distortion and perversion. This comment would indeed be true, if the trial judge were to permit such a confusing double instruction, linking and treating as equal two entirely disparate and unequal ideas. The presumption with which we are concerned in this case may be invoked only where the injured person is unavailable because of the injuries suffered or because of death. Such incapacity is the just reason for the presumption; the premise upon which the presumption rests is lacking in the situation of this defendant.

[3] The plaintiff has raised other issues, none of which merit extended discussion. The introduction of evidence to discredit statements of plaintiff's chief witness that he had an opportunity to observe the accident was within the court's discretion, if indeed that issue could be said to be collateral. Cf. Atkinson v. Atchison, T. & S. F. R. R., 197 F. 2d 244, 246 (10 Cir. 1952).

We refrain from comment upon the conduct of counsel, feeling certain that the trial judge, now forewarned, can handle the matter. Nor does this imply the slightest criticism of the judge below, who exhibited the patience of Job.

[4] We find no error in the court's failure to instruct the jury with reference to the doctrine of last clear chance, since the evidence furnished no basis for that issue.

Reversed and remanded.

Haynsworth, Circuit Judge (dissenting).

I am unpersuaded that Maryland would attribute any such evidentiary effect to the presumption as the majority conclude on the basis of an opinion of the Maryland Court of Appeals dealing with a different presumption in a very dissimilar context.

Ninety-five years ago, the Maryland Court of Appeals, indeed, did hold that the presumption that a decedent acted with due care for his own protection was an evidentiary one to be considered as such by a jury.[1] Fourteen years later, some eighty-one years ago, it again held that the presumption of due care was an evidentiary one to be considered by the jury.[2] So far as we are informed or can discover, that Court has never since enunciated any such doctrine. On the contrary, in a number of cases, it has held that the presumption that the decedent acted with due care is not an evidentiary one and that it was reversible error for the trial court to have instructed the jury that it might consider the presumption or attribute evidentiary effect to it.[3]

These are the only Maryland cases to which we have been referred or which we have found which deal with the particular presumption with which we are here concerned. The two earliest cases in the series, the last of which was decided in 1883, would support the position of my brothers were it not for the fact that every subsequent case, the

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[1] Northern Cent. R. Co. v. State, for Use of Geis, 31 Md. 357, 364 (1869).

[2] Baltimore & O. R. Co. v. State, for Use of Hauer, 60 Md. 449 (1883).

[3] Maryland Central R. Co. v. Neubeur, 62 Md. 391, 401-402 (1884); Philadelphia W. & B. R. R. Co. v. Stebbing, 62 Md. 504 (1884); Western Maryland R. Co. v. State, to Use of Shirk, 95 Md. 637, 53 A. 969 (1902); and see Central Ry. Co. v. Smith, 74 Md. 212, 21 A. 706 (1891); State, for Use of Chenoweth v. Baltimore Contracting Co., 177 Md. 1, 6 A. 2d 625 (1939).

earliest of which was decided in 1884, attributes no such effect to the presumption that the decedent acted with due care.

In State, for Use of Chenoweth v. Baltimore Contracting Co., 177 Md. 1, 6 A. 2d 625 (1939), the Court referred to that part of the opinion in Northern Cent. R. Co. v. State, for Use of Geis, 31 Md. 357, decided in 1869, which would attribute evidentiary effect to the presumption of due care. The Court in Chenoweth said:

> "In Maryland Central R. Co. v. Neubeur, 62 Md. 391, 402, the court narrowed that general language [that of Northern Cent. R. Co. v. State, for Use of Geis] by this statement: 'While it is natural, and as a general rule rational, to presume that a party acts from incentives of self-preservation, this presumption can only be indulged in the absence of proof to the contrary. To instruct the jury that they may, in considering the whole case "infer the absence of fault on the part of the plaintiff, from the known disposition of persons to avoid injuries to themselves," in the presence of testimony that tends strongly to show the existence of fault, is tantamount to instructing them that they may conclude as they please; that they may find upon presumption and put the evidence aside.' "

If it may be said that in some of the Maryland cases decided since 1883, there was no real dispute as to what the decedent did, it cannot be said that in all of those cases there was no underlying factual dispute calling for resolution before the trier-of-fact or the court exercised its judgment as to whether or not the decedent's conduct measured up to the standard of the ordinary prudent man. Thus in Western Maryland R. Co. v. Shirk, it was undisputed that the decedent, a drover, riding in the caboose of a freight train carrying a shipment of cattle, jumped from

the caboose after some of the cars of the moving train had become derailed. It was very much in dispute as to whether he had been told to jump from the caboose by an employee of the railroad, in which event his jumping would have been justified, or whether he was told to jump by a fellow drover, in which event his otherwise negligent act would not have been authorized or justified. In those circumstances, if the presumption of due care is ever to have any evidentiary effect, the jury should have been allowed to consider it in resolving the factual issue, hotly in dispute, as to the source of the instruction upon which the decedent acted. When jumping without the railroad's command was negligent beyond question, as the court held, the presumption, if to be given evidentiary effect at any time under the kind of circumstances with which we deal, should have been considered by the jury in determining whether the admitted command came from the railroad or from a volunteer unassociated with the railroad. Maryland's Court of Appeals held, however, that an instruction permitting the jury to consider the presumption that the decedent acted with due care was reversible error.

The question of the office of the presumption arises in this case under the following circumstances. Witnesses for the plaintiff testified that her decedent was crossing a street in downtown Baltimore at an intersection and in a marked pedestrian crosswalk, with the invitation and the protection of an electric "walk" signal, when he was struck by the bus. Witnesses for the defendant, however, testified that the decedent undertook to cross the street some distance from the intersection and the pedestrian crosswalk and without the invitation or protection of an electric signal. The evidence was sharply conflicting, but there was no dearth of it. Resolution by the jury of the factual question on the contributory negligence issue depended simply upon whether the jurors believed the one

set of witnesses or the other. No presumption artificially endowed with evidentiary weight was needful or useful to them in resolving the simple issue of credibility which was presented to them.

The District Court, of course, instructed the jury that the defendant had the burden of proving by a preponderance of the evidence that the decedent was contributorily negligent. On this question of fact, the Court clearly and unequivocally placed the burden of persuasion upon the defendant. If the jury, under its instructions, was unable to decide the issue of credibility upon which its finding of the decedent's conduct depended, if its mind was in equipoise, it was required to find for the plaintiff. If, then, my brothers are correct that under the Maryland law the jury should have been allowed to consider as evidence the presumption of due care, then the office of the presumption was not merely to place upon the defense the burden of producing evidence sufficient to support a finding inconsistent with the presumed fact; it was not merely to place upon the defendant the burden of persuasion on the factual question underlying the contributory negligence issue; it is to require that the defendant carry the burden of persuasion by a measure of proof greater than a mere preponderance of the evidence. How much greater the burden placed upon the defense to prove its contention beyond a preponderance of evidence, the majority does not specify, but it would invite them to apply a standard of proof akin to that applicable in criminal cases, that they must be persuaded beyond all reasonable doubt, for jurors are not unaware of the existence of that standard.

Having in mind the circumstances in which the question now arises and the practical effect of the instruction which my brothers now require, it is appropriate to turn to Grier v. Rosenberg[4] upon which my brothers' hats are hung.

[4] 213 Md. 248, 131 A. 2d 737 (1957).

In Grier, a passenger on a bus was injured when the bus suddenly stopped. There was testimony that the abrupt braking of the bus was caused by the action of the driver of an automobile which cut sharply in front of the bus. Witnesses at the scene noted the color and make of the automobile and its license number. The automobile did not stop, but the proof showed that registered to the defendant, Rosenberg, was an automobile having the license number noted by the witnesses and fitting their description of its make and color. The proof thus established the basic facts out of which arose a presumption that Rosenberg's automobile was being driven at the time by him, or by his authorized servant. Rosenberg testified that he was not in the vicinity at that time and that, while some of his employees on some occasions used his automobile with his authorization and on his business, no one of them had any recollection of having been in the vicinity of the accident at the time of its occurrence.

In this state of the proof, the plaintiff, in Grier, asked that the jury be instructed that proof that Rosenberg was the owner of the offending vehicle gave rise to a presumption that it was being driven at the time by him or by his authorized employee engaged in his business. The trial court refused to give the requested instruction and submitted the case to the jury under instructions which required them to find the facts in accordance with the preponderance of the evidence. The only direct evidence in the case was inconsistent with the presumed fact, so the Court's instruction that the jury should find the facts in accordance with the preponderance of the evidence, without reference to any permissible inference that might arise out of evidence of Rosenberg's ownership of the vehicle, required the jury to find for Rosenberg. It was tantamount to a mandatory instruction, unless the jury, on its own and without guidance by the judge, should perceive and understand the logical relation between the basic

evidentiary facts proven by the plaintiff and the ultimate presumed fact, and that is an unlikely assumption. See McCormick on Evidence, § 316.

Maryland's Court of Appeals held in Grier that the jury should have been instructed that a presumption that Rosenberg, or one of his authorized employees, was driving the car arose out of proof of his ownership of it which they might consider along with the defendant's testimony indicating that it was not.

In Grier, of course, unlike the present case, there was a dearth of proof. Beyond proof of the basic fact of Rosenberg's ownership of the offending vehicle, the plaintiff had no source of reliable information. The ultimate fact was peculiarly within the knowledge of her adversary, and the kind of general disclaimer he entered was not susceptible to direct contradiction. There was thus a compelling need for some instruction to inform the jury that it need not accept Rosenberg's self-serving testimony as conclusive of the plaintiff's rights.

The two presumptions are in sharp contrast. That with which the court was concerned in Grier arose out of proof of basic, evidentiary facts which were logically related to it. In the absence of some instruction, there was grave danger that the jury would not appreciate the evidentiary value of the basic, proven facts. The presumption of due care, however, is not dependent upon proof of any basic fact or facts. There is in this case no circumstantial evidence, the utility of which might go unnoticed by the jury in the absence of some instruction which would draw their attention to it.

Grier's formulation may be offensive to Thayerian purists, but clearly the circumstances there called for some instruction which would inform the jurors that they were not bound to accept Rosenberg's self-serving testimony.

The jury could have been told that a permissible inference that Rosenberg, or his authorized servant, was driving the offending automobile might be drawn from proof of his ownership of it, and that it was for the jury to determine, after consideration of Rosenberg's denials, whether or not his automobile at the time was being driven by him or one of his employees engaged in Rosenberg's business. An instruction in terms of the presumption would have no other practical effect.

Thus in Grier, reference to the presumption of the identity and authority of the driver arising out of proof of ownership of the vehicle did not place upon Rosenberg a greater burden of persuasion than proof by a preponderance of the evidence. Indeed, an instruction having the effect of the one required by Maryland's Court of Appeals was necessary if Rosenberg's self-serving testimony was not to foreclose the jury's consideration of the factual issue.

Grier thus dealt with a significantly different presumption, with a significantly different base, under starkly dissimilar circumstances and with totally different consequences in its effect upon the jury's consideration of the factual issues.

That a court holds under certain circumstances that a jury should be informed of the existence of a particular presumption, is far from persuasive authority that a different presumption having a wholly different relationship to the basic fact out of which it arises should be mentioned to a jury under different circumstances and with wholly different consequences. Indeed, it is trite now to repeat what everyone addressing himself to the subject has said that so much of the confusion over presumptions springs from failure to distinguish between different presumptions and the different situations out of which the problems regarding their use arise.

The occasion seems inappropriate for entry upon the controversy over the relative merits of any particular theory about the employment of presumptions and their offices. Since my brothers read Grier as taking Maryland out of the main stream of the prevailing current of thought, I may briefly refer to those authorities which my brothers adroitly, but it seems to me, inexactly, align on one side or the other, for I can give Grier no such reading.

Thayer thought that presumptions of the sort with which the Maryland Court was concerned in Grier should have no other office than to shift the burden of producing enough evidence to support a finding inconsistent with the fact sought to be presumed. When such evidence comes into the case, the presumption disappears. This is the theory adopted by the American Law Institute's Model Code of Evidence in Rule 704.

Professor Edmund Morgan, when he first began to write about presumptions, expounded a complicated theory which would attribute to some presumptions a larger effect, but he himself, withdrew from that suggestion long before he began to work as Reporter for the American Law Institute in the formulation of the Model Code of Evidence. When he approached that task, he was firmly of the view that such a presumption should not only shift the burden of production of evidence but should fix the ultimate burden of persuasion. He thought it should have no other office. That was the view which he and the majority of the advisers originally suggested when the Model Code of Evidence was being drafted. This he makes clear in his introduction to the Model Code of Evidence, particularly at page 57. Professor Morgan's pre-Model Code of Evidence views, and to which he still apparently adheres, therefore, lend no support to the rule which my brothers attribute to Maryland. As we have indicated, the Court in this case clearly placed the burden of persuasion upon

the defendant, which is all that Professor Morgan would require. Even his earliest writings ascribed no such undefined and unbounded evidentiary effect to presumptions as the majority would attribute to this one.

Wigmore, in general, supports the Thayerian view, but he clearly recognizes that there are times and circumstances calling for mention to a jury of a presumption, though he would not have that word employed by the court. In the circumstances of Grier v. Rosenberg, Wigmore advocates an instruction to the jury that it is bound by no rule of law in deciding the issue, but it may give special weight, in its discretion, to the fact that in the course of experience automobiles not shown to have been stolen are usually driven by their owners or their authorized servants. This is plainly stated in ¶ 21 under Remedies in § 2498a.[5]

I find in McCormick on Evidence nothing which lends support to what the majority does here. In §§ 316 and 317, to which the majority opinion refers, Professor McCormick is principally concerned with the preservation of the practical utility of circumstantial evidence in the face of inconsistent evidence, however incredible, going directly to the ultimate fact and the mechanics of telling the jury how to resolve the issue when the basic facts upon which the presumption rests are in dispute. In the first mentioned aspect of the problem he is dealing with the Grier v. Rosenberg situation. This is made abundantly clear in the ultimate paragraph of § 316 and the numerous examples that he uses, such as evidence of mailing in the face of the addressee's denial of receipt of the letter.[6] He would approve Grier v. Rosenberg and would not be so

[5] IX Wigmore on Evidence, 3d ed., pages 340-341. See, also, ¶ 41 on page 343 and the illuminating comments of others on pages 348-350.

[6] See also § 311.

inclined as Wigmore to quibble with the judge's use of the word "presumption". He recognizes, however, his kinship here with Wigmore[7] and joins Morgan in advocating placing the burden of persuasion upon the opponent of the presumption. McCormick recognizes, however, that a presumption is not evidence,[8] and the burden of persuasion he would have the opponent of the presumption shoulder is that of a preponderance of the evidence. McCormick may be searched in vain for any hint that a presumption may be used to place a heavier, undefined burden of persuasion on the presumption's opponent, or that a presumption having no evidentiary basis may be given evidentiary value.

I confess agreement with Professors Wigmore and McCormick. When there is a logical relation between the basic facts which are proven and the ultimate fact to be inferred or presumed, the evidentiary value of the basic facts is not to be dissipated simply because the adverse party presents some evidence, however incredible, in direct contradiction of the ultimate fact to be inferred or presumed. To preserve the evidentiary value of the basic facts proven as tending to prove the logically related ultimate fact, some instruction to the jury is required. This I take it Professor Morgan, too, would sanction, and I am not certain that the Model Code of Evidence would necessarily disapprove it, for it deals strictly with the effect of presumptions without reference to inferences which may reasonably be drawn from proven facts. What the Maryland Court of Appeals did in Grier v. Rosenberg, and all that it did, was to leave in the case a permissible inference inconsistent with the defendant's weak, self-serving denial of the ultimate fact. If, in the courts of a state whose trial judges are not allowed to comment upon

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[7] See § 317, fn. 8.

[8] See § 317, fn. 3.

the evidence, this must be done in terms of a presumption rather than in terms of a permissible inference, the effect is the same.

Far from being a departure from the current course of thought about presumptions, Grier v. Rosenberg is a specific application of the affirmatively expressed teachings of Wigmore. That decision is no premise for a conclusion that it is a rejection of what it embraces. What my brothers do is certainly a rejection of Wigmore's theory,[9] as they recognize, but Grier v. Rosenberg, the platform upon which they stand, was not.

The majority opinion places reliance upon the statement by Judge R. Dorsey Watkins in Jennings v. United States, D. Md., 178 F. Supp. 516, which indicates that he attributed some evidentiary weight to a presumption that a decedent had acted with due care in finding the facts underlying the contributory negligence issue tried to the court without a jury. Judge Watkins is an able and learned judge with a broad background as a Maryland lawyer, though in Jennings the specific question apparently was not developed in argument before him or discussed by him. Judge Winter, another able jurist with a background as a Maryland lawyer, heard the arguments of counsel in this very case and concluded that Maryland law did not sanction evidentiary use of this presumption in these circumstances, while Chief Judge Sobeloff, for whose great ability and deep understanding

[9] The presumption of due care, as we have noted, is not dependent upon proof of any basic fact or facts. If it be given no substantive, evidentiary value, it leaves no base of proven facts from which an inference of due care might conceivably be drawn. The presumption is wholly unlike those which Wigmore and McCormick think require some instruction to the jury in some situations, and the difference is critical. We have here no problem of preservation of the practical utility of circumstantial evidence; the jury was here called upon only to resolve, on conflicting, direct evidence, a simple question of credibility.

of Maryland law I have the greatest respect, disagrees. It seems to me, however, that we are not to decide the question of Maryland law by counting the noses of federal judges with Maryland backgrounds who have expressed or intimated a view o. an assumption upon one side or another. We must not depend upon secondary sources, and the only primary sources we have are the opinions of the Maryland Court of Appeals. It is there that we must find the answer, and I find nothing there which supports the views of my brothers. Grier v. Rosenberg is so far afield from Western Maryland R. Co. v. State, to Use of Shirk and other Maryland cases dealing with the presumption of due care in circumstances comparable to those in this case, that I can find no rational basis for a suggestion it overruled them *sub silentio* or that it furnishes any guidance whatever to the Maryland court's approach to a case like this one.

Finally, it may be observed that in Maryland the presumption that the decedent acted with due care for his own self-protection is no stronger and stands on no higher basis than the presumption that the driver of the bus that killed him acted with due care for the safety of pedestrians and others using the streets. Indeed, Maryland's Court of Appeals has spoken of the two presumptions in the same breath.[10] If therefore, upon a new trial, the District Court is to be required to inform the jury of one and permit it to weigh it as evidence, surely it must inform the jury of the other and permit it to weigh that one as evidence, too. The result will be a radical distortion and perversion of the burden of persuasion, but if the burden of persuasion resting on the defendant on the contributory negligence question is to be enlarged to confusing proportions, it cannot logically or fairly be

[10] P. W. & B. R. R. Co. v. Stebbing, 62 Md. 504 (1884); State, for Use of Chenoweth v. Baltimore Contracting Co., 177 Md. 1, 6 A. 2d 625 (1939).

said that the burden of persuasion resting upon the plaintiff as to the primary negligence question is not similarly enlarged to undefined proportions by the identical presumption of due care.

I do not understand that evidentiary use in Maryland of the presumption of due care by plaintiff or defendant is dependent upon the actor's availability as a witness. It is true that Geis[11] and Hauer,[12] the two ancient Maryland cases holding that the jury should be told of the presumption and instructed that they might give evidentiary weight to it, were wrongful death actions, and the question was that of the care of the plaintiff's decedent. Of the five subsequent cases,[13] rejecting the doctrine of Geis and Hauer, however, three, Neubeur, Stebbing and Smith, were personal injury actions, and two, Shirk and Chenoweth, were actions for wrongful death. In the first of those five cases, Neubeur, the doctrine of Geis and Hauer was broadly rejected as erroneous, and the court undertook no distinction of them on the ground that the plaintiff, Neubeur, was alive and able to testify in his own behalf. The rejection of Geis and Hauer was carried forward in Shirk, a wrongful death action, and mention of the presumption held inappropriate despite the decedent's unavailability as a witness.

I thus do not understand that Maryland has held, or even suggested, that the presumption of due care is to

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[11] Northern Cent. R. Co. v. State, for Use of Geis, 31 Md. 357 (1869).

[12] B. & O. R. Co. v. State, for Use of Hauer, 60 Md. 449 (1883).

[13] Maryland Central R. Co. v. Neubeur, 62 Md. 391 (1884); Philadelphia W. & B. R. R Co. v. Stebbing, 62 Md. 504 (1884); Western Maryland R. Co. v. State, to Use of Shirk, 95 Md. 637, 53 A. 969 (1902); and see Central Ry. Co. v. Smith, 74 Md. 212, 21 A. 706 (1891; State, for Use of Chenoweth v. Baltimore Contracting Co., 117 Md. 1, 6 A. 2d 625 (1939).

be given evidentiary effect if the actor is dead, but not if alive. Though, here, the plaintiff's decedent is unavailable as a witness while the defendant's bus driver presumably is available, I do not think those circumstances warrant disparate treatment of the concomitant presumptions.

Unconvinced that Maryland's Court of Appeals would apply to the presumption of due care the undefined evidentiary weight attributed to it by my brothers, I respectfully dissent.

EXHIBIT B.

Opinion of the Court of Appeals of Maryland in the controlling state decision upon which the judgment of the Circuit Court of Appeals must stand or fall.

213 Md. 248

Mabel Grier

v.

Harry Rosenberg

No. 143.

Court of Appeals of Maryland.

May 8, 1957.

Action by bus passenger against automobile owner for injuries received when automobile allegedly crossed in front of bus causing bus driver to stop bus suddenly. The Baltimore City Court, S. Ralph Warnken, J., rendered judgment for owner and passenger appealed. The Court of Appeals, Prescott, J., held that where bus driver testified as to license number of blue automobile fact that owner of blue car with such license number testified that he did not recall any activity on day in question, and

that there was possibility that one of his employees might have been operating automobile, did not rebut presumption that automobile was being operated by owner or one of his employees acting within scope of his employment.

Reversed and remanded for new trial.

1. Automobiles Key 242 (6)

There is rebuttable presumption that driver of automobile is agent, servant or employee of owner thereof, and that agent, servant or employee was operating automobile within scope of his employment.

2. Automobiles Key 242 (6)

Where city bus driver testified as to license number of blue automobile, which allegedly cut across in front of bus at great speed causing driver to stop bus suddenly and thereby injure bus passenger, fact that owner of blue automobile with such license plate testified that he did not recall any activity on day in which injury occurred, and that there was possibility that one of his employees might have operated automobile, did not rebut presumption that automobile was being operated by owner or one of his employees acting within scope of his employment.

3. Automobiles Key 242 (6), 245 (28), 246 (42)

Where there is question as to who was driving automobile involved in accident, and after plaintiff offers proof that defendant is owner, defendant offers no evidence or slight evidence on issue of agency, court should instruct jury that if they find that defendant is owner, they must find that he is responsible for negligence, if any, of driver, however, defendant's evidence may be so conclusive that it shifts burden of going forward to plaintiff, and then if plaintiff does not produce evidence defendant would be

entitled to directed verdict, but if evidence falls between two categories, issue of agency should be submitted to jury.

4. Automobiles Key 245 (26, 28)

In action by bus passenger against owner of automobile which allegedly cut across in front of bus causing driver to stop bus suddenly and thereby injure passenger, testimony of owner presented question for jury as to whether owner or his servant, acting within scope of his employment, was driving automobile at scene of injury.

5. Appeal and Error Key 209 (1)

Where question of sufficiency of evidence was not presented to or passed upon by trial court it was not necessary for reviewing court to pass upon it. Maryland Rules, rule 885.

6. Evidence Key 123 (10)

Where witness testified that she was seated in bus when she heard automobile making noise and bus stopped abruptly, that passenger struck her head against "view mirror," that she and another person rushed to passenger's aid and that bus driver said that he had automobile's number, and witness indicated that statement was made as part of driver's first actions and remarks after stopping, statement of driver was admissible as part of res gestae.

7. Appeal and Error Key 201 (2), 205

In action against automobile owner for injury received by passenger of bus when automobile crossed in front of bus causing driver to stop bus suddenly, wherein trial court refused to admit bus driver's report of accident to

his employer, and passenger withdrew offer of report, passenger could not in reviewing court raise question of admissibility of report or any comment by trial court concerning its being objectionable.

8. Trial Key 295 (1)

The language of trial court's charge must be examined as whole in order to assess its fairness and adequacy.

9. Trial Key 251 (8)

In action by bus passenger against automobile owner for injuries received when automobile allegedly crossed in front of bus causing driver to stop bus suddenly, wherein there was no claim that rule of res ipsa loquitur applied, instruction that mere happening of accident made no presumption of negligence on part of automobile owner was not improper.

Robert S. Rody and Amos I. Meyers, Baltimore, for appellant.

Herbert F. Murray, Baltimore (Clark, Smith & Prendergast and Clater W. Smith, Baltimore, on the brief), for appellee.

Before Brune, C. J., and Collins, Henderson, Hammond and Prescott, JJ.

Prescott, Judge.

The appellant filed suit in the Baltimore City Court on November 27, 1953, against the Baltimore Transit Company, a body corporate, Maurice E. Flather and Harry Rosenberg. There was a jury verdict in favor of all of the defendants on November 30, 1955. The appellant filed a motion for new trial, which was overruled as to the Balti-

more Transit Company and Maurice E. Flather on January 27, 1956, and judgment "absolute" was entered in favor of the latter parties on the same date. The motion was held *sub curia* by the Court as to the defendant, Harry Rosenberg, until July 16, 1956, when it was overruled, and judgment "absolute" entered. This is an appeal from the latter judgment.

On January 5, 1953, the appellant boarded a Baltimore Transit Company bus northbound on Caroline Street at its intersection with Monument Street in Baltimore City. She was the last of a number of passengers to board the bus, and was paying her fare when the bus driver, after the light changed to green and he began to move, caused the bus to come to a stop so sudden and violent that she was thrown against the front of the bus and caused to strike her head.

The unusual and severe stop, according to the bus driver, and several passengers on the bus, was necessitated by an automobile on the left of the bus which suddenly cut across the front of the bus at great speed and turned right into Monument Street. The appellant also testified to the sudden stop, but did not know its cause. The bus driver testified that in addition to noting that the car was blue and had one man in it, he took deliberate pains to observe the license plate number, because of the "rotten cut" it had given him and made an official report of the accident to his employer, on which he included that number. An official of the Department of Motor Vehicles testified that the license number in question was issued for an automobile owned by the appellee, Harry Rosenberg, and there was testimony that its color was blue.

I.

The appellant first contends that after she had offered evidence from which the jury could find as a matter of fact

that the appellee was the owner of the automobile allegedly causing the injury complained of, she was entitled to an instruction to the jury (which the Court declined to give), that if the jury found as a fact ownership of the car in the appellee, there arose a rebuttable presumption that the automobile was being operated by the appellee or by his agent, servant and/or employee acting within the scope of the agent's, servant's and/or employee's employment. To this, the appellee replies that he concedes the presumption as above stated, but as he offered evidence relating to his car and its possible drivers, there was no requirement nor necessity for an instruction concerning the presumption. His only evidence relative thereto was his own testimony, which was to the effect that he knew nothing of the injury complained of until nearly six months after its occurrence; that he did not know or recall any activity, on the day in question, that would have involved his presence at the scene of the alleged injury; that there was a possibility that his car might have been there and some one from his office could have been driving it; that he had been treated at the Sinai Hospital, about six blocks from the scene, and still makes visits there for medical care; and that he had inquired among his employees and none of them recalled any occasion for driving his car on the day in question, or at that time being in the vicinity where the plaintiff received her injury.

[1, 2] We think the instruction relative to the presumption should have been given. In a long line of decisions of this Court, it has been held that there is a rebuttable presumption that the driver of an automobile is the agent, servant and/or employee of the owner thereof. Among the many cases so holding, see Fowser Fast Freight v. Simmont, 196 Md. 584, 588, 78 A. 2d 178; Taylor v. Freeman, 186 Md. 474, 47 A. 2d 500; Pennsylvania R. R. v. Lord, 159 Md. 518, 151 A. 400. And this includes a rebuttable pre-

sumption that the agent, servant and/or employee was operating the automobile within the scope of his employment. Erdman v. Horkheimer, 169 Md. 204, 206, 207, 181 A. 221; Brown v. Bendix Aviation Corp., 187 Md. 613, 621, 622, 51 A. 2d 292.

This Court also has previously approved the granting of instructions of this nature, relating to negligence. Indeed, if the instruction be not granted, how is the jury to know of the presumption? No matter how clearly the ownership of a motor vehicle might be established, without any information of, or instruction concerning, the presumption, the jury might have great reluctance in finding the driver of such vehicle an agent or servant of the owner acting within the scope of his employment. In Chesapeake Iron Works v. Hochschild, 119 Md. 303, 311, 86 A. 345, 346, this Court approved a prayer wherein the Court ruled as a matter of law (the trial Court sitting without a jury) that if certain facts were established, they "* * * will be *prima facie* evidence of negligence * * * and, unless upon the whole evidence such *prima facie* evidence is rebutted, then the verdict must be for the plaintiffs." See also Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed 270. Again in Frenkil v. Johnson, 175 Md. 592, 3 A. 2d 479, the Court of Appeals held the instructions granted by the trial Court were not prejudicial to the defendant. Plaintiff's first prayer instructed the jury that if they should find certain facts "* * * a rebuttable presumption of negligence on the part of the defendant * * * arises and they may find their verdict for the plaintiff unless they further find from all of the evidence in the case that the defendant was not guilty of any negligence which directly caused or contributed to the injury * * *" or that the plaintiff was guilty of contributory negligence. See also Potomac Edison Co. v. Johnson, 160 Md. 33, 34, 152 A. 633; Potts v.

Armour & Co., 183 Md. 483, 489, 39 A. 2d 552; and compare Pindell v. Rubenstein, 139 Md. 567, 578, 115 A. 859.

In McCormick on Evidence (1954 Ed.), pp. 667-672, Professor McCormick says:

> "The form books are replete with instructions on presumptions, and the digests give abundant evidence of the widespread and unquestioning acceptance of the practice of informing the jury of the presumption despite the fact that countervailing evidence has been adduced upon the disputed inference.
>
> "It seems to me that the practice is wise and indeed almost necessary * * *.
>
> "Instructions upon presumptions, whether permissive or mandatory, since they announce judicial custom crystallized into rules, escape as we have seen the imputation of being the judge's individual opinion or comment.
>
> "They can give the jury substantial aid in avoiding mistakes in difficult cases. * * *
>
> "I am inclined to think that it is a more natural practice, especially under the American tied-judge system, *to mention the presumption*, so that the jury may appreciate the legal recognition of a slant of policy or probability as the reason for placing on the party this particular burden." (Italics supplied.)

[3] In cases of this nature, after the plaintiff has offered proof of the ownership of the automobile in the defendant, if the defendant does not offer any evidence on the issue of agency, the Court should instruct the jury that if they find as a fact that the defendant owned the car, they must find that he is responsible for the negligence (if any) of the driver. If the defendant does present evidence to show that the alleged driver was engaged on business or a purpose of his own, it may be so slight that the Court will rule it is insufficient to be considered by

the jury in rebuttal of the presumption, in which case the Court should grant the same instruction it would have granted if the defendant had offered no evidence on the issue. The evidence may be so conclusive that it shifts the burden or duty of going forward with the evidence back to the plaintiff, in which event the defendant would be entitled to a directed verdict, if the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant's evidence. Erdman v. Horkheimer & Co., supra, 169 Md. 207, 181 A. 221; Fowser Fast Freight v. Simmont, supra, 196 Md. 588, 78 A. 2d 178. The evidence, however, may fall between the two categories mentioned above, in which event the issue of agency should be submitted to the jury. Cf. 3 Md. Law Rev. 287, 288. It would be difficult, if not impossible, to lay down a rule, that would apply in all cases, as to when the evidence is so slight that it is insufficient to be considered by the jury in rebuttal of the presumption of agency, or so conclusive as to require a directed verdict for the defendant. These matters must depend upon, and be decided by, the facts developed in each individual case.

II.

[4] The appellant next contends the testimony of the appellee, outlined above, was so slight and insubstantial that it was no evidence at all, and she was entitled to a directed verdict on the issue of agency, if the jury found as a fact that it was the appellee's car that was at the scene of the accident. With this, we are unable to agree. The defendant had no knowledge of any complaint by the appellant until approximately six months after the alleged injury. Under these rather unusual circumstances, we conclude the appellee's testimony presented a proper issue on the question of whether or not the appellee, or his

servant acting within the scope of his employment, was driving the appellee's car at the scene of the injury to be presented to the jury.

III.

[5] The appellant then claims that if such testimony of the defendant did amount to "evidence," it consisted entirely of self-serving statements made by an interested party, and therefore was legally insufficient to rebut the aforesaid presumption. We are unable to discover where the question was presented to, or passed upon, by the trial Court; therefore, under former Rule 9 of the General Rules of Prac. and Proc. (Now Rule 885 of the Maryland Rules) we do not feel it is necessary to pass upon the same.

IV.

[6] A witness produced by the appellant, a Mrs. Lila Vernon, testified she was seated on the left side of the bus on the first regular seat; that she heard an automobile making a noise and the bus stopped abruptly; that the appellant struck her head against the "view mirror;" that she and another person rushed to her aid; and that the motorman said: "I have the car number." In reply to a question propounded by the Court as to *when* this statement was made, the witness indicated it occurred as part of the driver's first actions and remarks after the sudden stop, and she said: "Just a very few minutes, because he rushed to the lady" after the stop. In response to the question of "How many minutes," she replied: "* * * well, he could have made the statement before getting to us. * * * it was said shortly after the sudden stop." The trial Court ruled out this statement of the driver. It was material testimony, as the ownership of the appellee's car was attempted to be established at the trial by the

proof of its color, and its license plate number furnished by the bus driver. As the case must be remanded for the error committed under I, it is appropriate to say we think it was admissible as part of the *res gestae*. United Rys. & Elec. Co. v. Cloman, 107 Md. 681, 69 A. 379; Shirks Motor Express v. Oxenham, 204 Md. 626, 636, 106 A. 2d 46.

V and VI.

[7] The fifth and sixth questions raised by the appellant may be considered together. She argues that the trial Court committed reversible error in refusing to admit a report of the bus driver to his employer, which was made in the usual and ordinary course of business; and, also, in commenting, in the presence of the jury, that the said report was "objectionable" insofar as the defendant Rosenberg was concerned. These contentions require little discussion. The trial Judge permitted the witness to use the report to refresh his recollection as to the number of the license plate; whereupon, counsel for the appellant stated: "Well, the license has already been stated, so we will *withdraw the report*, because the testimony is in." (Emphasis supplied.) Having withdrawn the offer of the report, the appellant certainly has no right to raise in this Court the question of its admissibility, or any comment made by the trial Court concerning its being objectionable. In view of the above, we do not feel that these points should have been presented in this appeal.

VII.

[8] The appellant further argues that the trial Court showed partiality in favor of the appellee by "dwelling" on the many ways in which the jury might render a verdict in his favor. This Court has held that the language of the trial Court's charge must be examined as a whole in order to assess its fairness and adequacy, *vel non*. West

v. Belle Isle Cab, 203 Md. 244, 250, 100 A. 2d 17. We have carefully examined the charge delivered in this case as a whole and find no unfairness or partiality therein. We are, therefore, unable to discover any merit in this contention.

VIII.

[9] The appellant finally claims the trial Court erred by including in its charge an instruction that the mere happening of the accident raised no presumption of negligence on the part of the defendant. She cites as her authority for this argument the case of Pindell v. Rubenstein, supra, 139 Md. 567, 115 A. 859. In making this contention, the appellant apparently is confused in her presumptions. In that case, the facts offered in evidence by the plaintiff supported an application of the doctrine of *res ipsa loquitur*; and, if those facts were accepted by the jury, they were sufficient to support an inference of *negligence* from the mere happening of the accident. This Court held the granting of an instruction that the mere happening of the accident raised no presumption of negligence, under such circumstances, was misleading and incorrect. In the case at bar, there is no claim that the rule of *res ipsa loquitur* applied. The presumption involved herein is one of *agency*, not one of *negligence*. The giving of the instruction in this case did not, in any way, affect the presumption of agency and was justified and proper.

Because of the error set forth in I, the judgment must be reversed and the case remanded for a new trial.

Judgment reversed, with costs, and case remanded for a new trial.

APPENDIX B.

EXHIBIT A.

Judgment of the United States Court of Appeals, Fourth Circuit:

Judgment.

United States Court of Appeals
for the
Fourth Circuit.

No. 8941.

State of Maryland, for the use of Gloria S. Geils, surviving widow, and Roswell W. Geils, 3rd, Leslie Ann Geils, Mary E. Geils, Susan M. Geils, Andrew S. Geils and Sarah Geils, surviving infant children of Roswell W. Geils, Jr., deceased, and Gloria S. Geils, administratrix of the estate of Roswell W. Geils, Jr., deceased,

Appellants,

vs.

Baltimore Transit Company, a body corporate, and Gerald M. Harrison,

Appellees.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, with directions to set aside the verdict and grant a new

trial in accordance with the opinion of the Court filed herein.

Simon E. Sobeloff,
Chief Judge, Fourth Circuit,

J. Spencer Bell,
United States Circuit Judge.

I dissent:

Clement F. Haynsworth, Jr.,
United States Circuit Judge.

Filed Mar. 9, 1964, Maurice S. Dean, Clerk.

EXHIBIT B.

Order of the United States Court of Appeals, Fourth Circuit, on petition for rehearing, en banc:

United States Court of Appeals
For the Fourth Circuit.

No. 8941.

State of Maryland, for the use of Gloria S. Geils, surviving widow, and Roswell W. Geils, 3rd, Leslie Ann Geils, Mary E. Geils, Susan M. and Sarah Geils, surviving infant children of Roswell W. Geils, Jr., deceased, and Gloria S. Geils, administratrix of the estate of Roswell W. Geils, Jr., deceased,

Appellants,

vs.

Baltimore Transit Company, a body corporate, and Gerald M. Harrison,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

The Court having on March 9, 1964, rendered its decision reversing the judgment of the said District Court

appealed from in this cause, and the appellees having on April 29, 1964, filed a petition for rehearing by the Court en banc, and the same having been fully considered,

It is now here ordered this 11th day of June, 1964, that the rehearing asked for be, and it is hereby, denied.

Simon E. Sobeloff,
Chief Judge, Fourth Circuit,

Clement F. Haynsworth, Jr.,
United States Circuit Judge,

J. Spencer Bell,
United States Circuit Judge.

A true copy,
Teste:

Maurice S. Dean, Clerk,
U. S. Court of Appeals for the
Fourth Circuit,

By Margaret L. Davis,
Deputy Clerk.

Filed June 11, 1964, Maurice S. Dean, Clerk.

APPENDIX C.

EXHIBIT A.

Order of the Circuit Court of Appeals staying its judgment pending application for Writ of Certiorari:

United States Court of Appeals
For the Fourth Circuit.

No. 8941.

State of Maryland, for the use of Gloria S. Geils, surviving widow, and Roswell W. Geils, 3rd, Leslie Ann Geils, Mary E. Geils, Susan M. Geils, Andrew S. Geils and Sarah Geils, surviving infant children of Roswell W. Geils, Jr., deceased, and Gloria S. Geils, administratrix of the estate of Roswell W. Geils, Jr., deceased,

Appellants,

vs.

Baltimore Transit Company, a body corporate, and Gerald M. Harrison,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Upon the application of the appellees, by their counsel, and for cause shown,

It is ordered that the issuance of a certified copy of the judgment of this Court in lieu of a mandate be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of

certiorari is filed in the Supreme Court within 30 days from this date.

June 19, 1964.

Simon E. Sobeloff,
Chief Judge, Fourth Circuit.

A true copy,
Teste:

(Seal)

Maurice S. Dean, Clerk,
U. S. Court of Appeals for the Fourth Circuit,
By Margaret L. Davis,
Deputy Clerk.

EXHIBIT B.

Order of the Circuit Court of Appeals extending stay of its judgment:

United States Court of Appeals
For the Fourth Circuit.

No. 8941.

State of Maryland, for the use of Gloria S. Geils, surviving widow, and Roswell W. Geils, 3rd, Leslie Ann Geils, Mary E. Geils, Susan H. Geils, Andrew S. Geils and Sarah Geils, surviving infant children of Roswell W. Geils, Jr., deceased, and Gloria S. Geils, administratrix of the estate of Roswell W. Geils, Jr., deceased,
Appellants,

vs.

Baltimore Transit Company, a body corporate, and Gerald M. Harrison,
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Upon the application of the appellees, by their counsel, and for the cause shown,

It is ordered that the issuance of a certified copy of the judgment of this Court in lieu of a mandate be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within 30 days from July 19, 1964.

July 20, 1964.

(Filed July 21, 1964)

Simon E. Sobeloff,
Chief Judge, Fourth Circuit.

A true copy,
Teste:

Maurice S. Dean, Clerk,
U. S. Court of Appeals for the
Fourth Circuit.